



STATE OF INDIANA

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Mr. Chris Baumann, Esq.
C/o Responsive Education Solutions
PO Box 292730
Lewisville, TX 75029

*Re: Informal Inquiry 14-INF-06; Release of Student Directory
Information to a Non-Profit Organization*

Dear Mr. Baumann:

This is in response to your informal inquiry regarding a records request involving directory information of student disclosure to a non-profit organization. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

BACKGROUND

Your organization, ResponsiveEd, is a Texas-based non-profit foreign organization registered with the Indiana Secretary of State as Responsive Education Solutions, Inc. Your goal is to utilize certain "directory information" from local school corporations to develop public awareness campaigns targeted at families interested in charter schools. Your inquiry involves two primary questions:

1. Does the Access to Public Records Act prohibit the disclosure of "directory information" – as that term is defined by FERPA (Family Educational Rights and Privacy Act) – to a nonprofit organization for the purpose of operating an Indiana public charter school?
2. If the Act does not prohibit the disclosure described above, would a school corporation have a duty under the Act to provide the "directory" information" in a list form if: (1) such information is contained in an electronic data storage system, and (2) such information is requested on paper or any other method of electronic retrieval compatible with the school corporation's data storage system?

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* Ind. Code § 5-14-3-1. School corporations and institutions in Indiana are public agencies for the purposes of the APRA. *See* Ind. Code § 5-14-3-2. Accordingly, any person has the right to inspect and copy the School’s non-confidential public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise non-disclosable under the APRA. *See* Ind. Code § 5-14-3-3(a).

The Indiana Access to Public Records Act does not specifically address FERPA or educational records. Rather, the Act prohibits disclosure of any information required to be kept confidential by Federal law. *See* Ind. Code § 5-14-3-4(a)(3). Under federal law, the federal government may withhold funding for a program “...for any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information...) of students without the written consent of the parents to any individuals, agency, or organization...” *See* 20 U.S.C. §1232g(b)(1).

However, educational facilities may disclose directory information, such as names and addresses, if they have provided the parents with an opportunity to inform the facility that certain information may not be disclosed about their children. *See* 20 U.S.C. § 1232g(a)(5)(B). In short, a school may disclose directory information if they give parents notice and the opportunity to opt out of the disclosure. The term “directory information” relating to a student includes the following: the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. *See* 20 U.S.C. § 1232g(a)(5)(A). It should be noted the directory information portion of FERPA is permissive and not mandatory. Therefore, a person requesting information may be denied at the School’s discretion; conversely, the school would not be penalized for granting an access request for directory information.

However, there is more to the analysis. What the APRA does is affirmatively prohibit the release of a list of student names for commercial purposes *but only if the school has adopted a policy* defining commercial entities and commercial purposes. *See* Ind. Code § 5-14-3-3(f)(3). It states:

This provision only applies if the governing body of the public school corporation adopts a policy:

(A) with respect to disclosure related to a commercial purpose, prohibiting the disclosure of the list to commercial entities for commercial purposes;

(B) with respect to disclosure related to a commercial purpose, specifying the classes or categories of commercial entities to which the list may not be disclosed or by which the list may not be used for commercial purposes

Emphasis added.

Although not specifically addressed in Section (f)(3), the APRA distinguishes non-profit activities from commercial activities in other subsections (See Ind. Code § 5-14-3-3(e); Ind. Code § 5-14-3-8(k)). In a very factually similar Opinion found at 08-FC-15, former Public Access Counselor O’Neal reasoned even non-profit, tax-exempt entities can engage in commercial activities. I agree with your reasoning it is clear from the language of other APRA provisions the General Assembly intended to differentiate “commercial purposes” from “non-profit activities”.

I deviate from Counselor O’Neal’s Opinion (as well as a similar opinion found at 12-INF-23 written by Counselor Hoage) in that, I do not consider there to be an automatic flat prohibition on the disclosure of student names to commercial entities. The distinction I make from those analyses is the requirement that a school must first adopt a policy characterizing its definition of commercial entities and commercial purposes.

Without going into a full exploration of the Commerciality Doctrine, I agree with Counselors O’Neal and Hoage that non-profits can engage in commercial activities and could be reasonably construed to be a commercial entity, but I cannot definitively state your organization would be considered by all schools to be a commercial entity. It is not for the Public Access Counselor to decide, as I find this argument relatively irrelevant considering the APRA has given schools the discretion to make the distinction and categorize entities according to their opinion of what constitutes a commercial entity.

In summation to your first inquiry, the APRA does not automatically prohibit the release of directory information, nor does FERPA. A prohibition would only apply if an individual school corporation ratifies a policy considering your type of organization to be a commercial entity.

As for your second question regarding an affirmative duty to disclose an existing list, Ind. Code § 5-14-3-3(f) states in part:

Notwithstanding the other provisions of this section, a public agency is not required to create or provide copies of lists of names and addresses (including electronic mail account addresses) unless the public agency is required to publish such lists and disseminate them to the public under a statute. **However, if a public agency has created a list of names and addresses (excluding electronic mail account addresses) it must permit a person to inspect and make memoranda abstracts from the list unless access to the list is prohibited by law.**

Emphasis added.

Section (d) states:

...a public agency that maintains or contracts for the maintenance of public records in an electronic data storage system shall make reasonable efforts to provide to a person making a request a copy of all disclosable data contained in the records on paper, disk, tape, drum, or any other method of electronic retrieval if the medium requested is compatible with the agency's data storage system

Read alone, this would create a duty for a school who maintains a list of students to release the list to a non-commercial entity upon request. It is clear, however, under FERPA, that student directory information is permissive, but not mandatory release. What complicates this issue further is the structure of FERPA. The language of FERPA is a mandate to the United States Secretary of Information who may not issue grants to public school systems who release student educational records. If a school does not participate in U.S. Department of Education grants, it can presumably disclose anything it wants unless another privacy statute applies. See *Chi. Tribune Co. v. Bd. of Trs. of the Univ. of Ill.*, 680 F.3d 1001 (2012) for an interesting analysis of FERPA application. Because FERPA is more of a “carrot and stick” form of Federalism, I do not find the argument under Ind. Code § 5-14-3-4(a)(3) to be compelling enough to overcome the APRA requirement that lists must be disclosed absent a ratified policy stating otherwise. Additionally, I do not believe Federal preemption pursuant to the Supremacy Clause of Article VI, clause 2 of the United States Constitution would preclude lists from being disclosed. I find the opt-out clause of the directory information portion FERPA would prevent a student from being on that list or alternatively, to be redacted from the list.

In short, APRA creates a duty to disclose lists of students to non-commercial entities if the list exists and a school has not adopted a policy under Ind. Code § 5-14-3-3(f)(3). FERPA on the other hand, explicitly allows disclosure of directory information if parents have not opted out. Read together, I can reasonably conclude *existing* lists of directory information may be disclosed if parents have not opted out under FERPA and no policy exists prohibiting release.

Please do not hesitate to contact me with any further questions.

Best regards,

A handwritten signature in black ink, appearing to read 'L. Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor